No. 84-378

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GOLDEN STATE TRANSIT CORPORATION,

Petitioner,

VS.

CITY OF LOS ANGELES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Can a municipality claim an exemption from the antitrust laws under the "state action" doctrine, where the municipality's anticompetitive action was taken under a general grant of authority from the state and was not actively supervised by the state?

QUESTION NO. 2

Can a municipality claim an exemption from the antitrust laws under the "state action" doctrine, where the municipality's anticompetitive conduct was unconstitutional because pre-empted by the National Labor Relations Act?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth in the caption of the petition.

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GOLDEN STATE TRANSIT CORPORATION,

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vs.

CITY OF LOS ANGELES,

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

Petitioner Golden State Transit Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on February 28, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated February 28, 1984, is reported at 726 F.2d 1430 (9th Cir. 1984) (Appendix "A"). The order entered on May 14, 1984 denying rehearing *en banc* is set out in Appendix "B". The opinion of the district court is reported at 563 F. Supp. 169 (C.D. Cal. 1983), *aff'd*, 726 F.2d 1430 (9th Cir. 1984) (Appendix "C").

JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit was entered on February 28, 1984. Petitioner filed a timely petition for rehearing, which the Ninth Circuit denied in an order dated May 14, 1984. On August 6, 1984, by order of Mr. Justice Rehnquist, the time

for filing of this petition for certiorari was extended to September 10, 1984. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved (set forth in Appendix "D") are:

Supremacy Clause, United States Constitution, Article VI, Clause 2.

Sherman Antitrust Act, § 1, 26 Stat. 209, *as amended*, 15 U.S.C. § 1 (1976).

California Constitution, Article XII, § 3.

California Constitution, Article XII, § 4.

California Public Utilities Code, §§ 5351, 5353, 5360, 5371, 5373, 5373.1, 5374, 5375.1, 5378, 5391, 5401, 5411-5419.

Los Angeles City Charter, §§ 210-212.

Los Angeles Administrative Code, § 13.4.

Los Angeles Municipal Code, § 71.02.

STATEMENT OF THE CASE

This case involves a classic antitrust conspiracy to exclude a competitor in which the City of Los Angeles was a full and equal partner. Dismissal of the antitrust complaint below raises unresolved questions of the scope of state action immunity and whether that doctrine applies in the face of patently unconstitutional municipal action.

Prior to 1981, petitioner Golden State Transit Corporation ("Golden State") was the largest taxicab operator in the City of Los Angeles, holding approximately 30% of the market. Golden State operated pursuant to a franchise granted by the City of Los Angeles ("City").

No California ("State") statute expressly grants the City authority to franchise taxicabs. That authority is implicit in an exemption to the State Public Utilities Commission's jurisdiction over common carriers. The exemption, which is the only

State statute that even refers to municipal regulatory authority over taxicabs, provides (in pertinent part):

> This chapter [setting forth the powers of the California Public Utilities Commission] does not apply to . . . (g) taxicab transportation service licensed and regulated by a city or county, by ordinance or resolution . . . .

Cal. Pub. Util. Code § 5353. This is the sum total of the State's guidance to the City with respect to taxicabs.

In March of 1980, Golden State applied for a renewal of its franchise which was due to expire in 1981. Twelve other franchise holders also applied for similar renewals. Pursuant to the City's procedures, these renewal applications were referred, in turn, to three bodies – the Department of Transportation, the Board of Transportation Commissioners, and the Transportation and Traffic Committee of the City Council. Each of these bodies found that Golden State had complied with all of the requirements for franchise renewal and each recommended that the City Council approve the Golden State application, along with five other applications.[1]

In October of 1980, Golden State's collective bargaining agreement with the International Brotherhood of Teamsters Local 572 ("Teamsters"), expired. Despite lengthy negotiations, the parties were unable to reach agreement and the Teamsters went on strike in February of 1981. The negotiations and subsequent strike were peaceful and proceeded without any reports of violence.

Throughout negotiations, the Teamsters and Golden State's competitors engaged the City in a scheme to withhold renewal of Golden State's franchise.[2] At a City

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[1] All of these six taxicab operators were found to have complied with all of the terms and conditions of their franchises and, therefore, entitled to renewal. Six others were recommended for probationary franchises. One taxicab operator was not recommended for franchise renewal.

[2] Golden State also contends that, pursuant to this conspiracy, the City failed to grant Golden State's applications to increase its

Council meeting held on March 23, 1981, Teamsters representatives appeared, accused Golden State of bargaining in bad faith, and urged that the franchise not be renewed. Golden State's competitors also appeared at the meeting, claimed that taxicab service in Los Angeles would be improved if Golden State did not operate, and argued against franchise renewal. At this meeting, the City Council informed Golden State that its franchise would not be renewed unless it signed a new agreement with the Teamsters.[3] During the course of this meeting, members of the City Council made it expressly clear that they refused to renew Golden State's franchise because they disapproved of Golden State's stance in bargaining and its failure to agree to the Teamsters' demands.

On April 28, 1983, the City issued a cease and desist order prohibiting Golden State from operating its taxicabs. Because of this order, Golden State ceased doing business in Los Angeles and ultimately was driven into bankruptcy.[4]

Golden State's antitrust complaint was filed on March 7, 1983, alleging, *inter alia*, that the City's actions were part of a conspiracy with the Teamsters and incumbent taxicab operators to exclude petitioner from the market.[5]

The district court dismissed petitioner's antitrust claims based on the doctrine enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and the Ninth Circuit agreed. On appeal, the Ninth Circuit held that the exemption from state regulation set forth

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rates and to lease taxicabs, both of which would have allowed Golden State to operate efficiently and to compete effectively.

[3] The other five applicants recommend for approval all received timely franchise renewals at a Council meeting on February 11, 1981.

[4] The district court originally granted Golden State's motion for a preliminary injunction on the ground that the City's refusal to renew Golden State's franchise was preempted action under federal labor law. The Ninth Circuit reversed, *Golden State Transit Corporation* v. *City of Los Angeles*, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 729 (1983).

[5] The district court's jurisdiction was based on Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) and on 28 U.S.C. §§ 1331, 1337.

above satisfied this Court's requirement that the anticompetitive actions of local government be clearly articulated and affirmatively expressed. The court further held that municipalities were exempt from the "active supervision" test for traditional municipal functions. In weighing the claim that the challenged activity was within the contemplation of the State in granting general authority, the Ninth Circuit did not consider that the municipality's actions were unlawful because they were preempted by federal labor law.

REASONS WHY A WRIT SHOULD ISSUE

In *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 54 (1982), this Court ruled that only where municipalities operate pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition does "state action" immunity apply. Circuit courts evaluating claims to "state action" immunity in light of *City of Boulder* have had difficulty applying this standard. *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U S. June 11, 1984) (No. 82-1832); *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. August 9, 1983) (No. 83-138). *See also Affiliated Capital Corp.* v. *City of Houston*, 47 Antitrust & Trade Reg. Rep. (BNA) 181 (5th Cir. July 16, 1984) (*en banc*). Indeed, this Court has granted certiorari in *Town of Hallie* apparently to determine whether a general grant of authority in a regulatory area is sufficient to confer "state action" immunity on a municipality for actions within that general grant, and whether a municipality must be actively supervised by the state in order to qualify for such immunity. Both of these questions are squarely presented by the instant petition.

In this case, the Ninth Circuit construed a noncommittal exemption from state regulation as a clear state policy to displace competition with regulation, and found that "active supervision" was unnecessary where "traditional municipal functions" were involved.[6] This standard represents a

[6] 726 F.2d at 1434.

substantial departure from this Court's prior decisions, which have refused to insulate municipalities from federal antitrust liability unless a city's anticompetitive acts were clearly endorsed by the state acting in its sovereign capacity.

The issues raised in the instant case are more compelling than those in *Town of Hallie*. In this case there was a specific regulatory framework for the State of California, through its Public Utilities Commission, to regulate taxicabs. However, the State did not undertake any regulation and instead, pursuant to the statutory exception, allowed the City of Los Angeles to occupy the field. That occupation was without any state direction or indication of the type of regulation deemed permissible and without any limitation whatsoever on the municipality's power. In essence, the State of California has chosen not to regulate taxicab services, allowing California municipalities to do so as they see fit. This kind of grant of municipal power is the very state "neutrality" that this Court found invalid as a basis for immunity in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982).[7] Thus, the Court's resolution of the *Hallie* case, which involves a far more detailed grant of regulatory power than found here, may not provide adequate guidance to dispose of the instant case.[8]

This petition should also be granted to resolve an extremely significant issue of first impression: whether a municipality's unconstitutional conduct can be deemed action contemplated by the state and thus subject to *Parker* v. *Brown* immunity. In this case, the City, at the behest of its co-conspirators,

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[7] In *Hallie*, the court of appeals found specific "authority [for the city] to decide where to extend sewer services and to insist on annexation as a condition of extending sewer services to the surrounding area." 700 F.2d at 382; *see* Sections 66.09(2) (c) and 144.07 of the Wisconsin statute, *quoted at* 700 F.2d at 382 nn. 13 & 14. In contrast, the City of Los Angeles' authority to regulate taxicabs, as noted above, is no more specific than an exemption to the State's jurisdiction over common carriers. *See* California Public Utilities Code, § 5353(g).

[8] Petitioner submits that, at the very least, it would be appropriate to hold this case pending disposition of *Town of Hallie*.

denied Golden State's franchise because it disagreed with Golden State's stance in labor negotiations. Such conduct is plainly unconstitutional, as this Court has repeatedly held that no state or local government can regulate peaceful work stoppages or force an employer or union to agree to particular substantive provisions in a collective bargaining agreement. This Court should accept this case for argument in order to clarify that a state's general grant of authority does not contemplate unconstitutional acts committed by a municipality in furtherance of an anticompetitive conspiracy.

I. THE NINTH CIRCUIT'S HOLDING WOULD PLACE NO BOUNDS ON A CITY'S POWER TO RESTRICT COMPETITION

This Court, in a long line of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), has held that the federal antitrust laws were not intended by Congress to apply to the sovereign actions of a state. Thus, the issue in all subsequent "state action" cases has been whether challenged action represents a decision to displace competition made by "the state acting as sovereign." *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Three basic tests have evolved to distinguish immune state action from private or purely local government conduct not entitled to immunity:

(1) Whether the restraint emanates directly from the state itself, *Hoover* v. *Ronwin*, ____ U.S. ____, 104 S. Ct. 1989 (1984) (conduct challenged was in reality that of Arizona Supreme Court and therefore of the State of Arizona); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (Arizona Supreme Court real party in interest and State Bar Association therefore acting as agent of state);

(2) Whether the conduct is compelled by the state, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); and

(3) Whether the conduct was "contemplated" by the state, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413-15 (1978), or carried out

> pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation, *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 54 (1982), and was actively supervised by the state itself. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

Because in this case the defendant is a city, not a state, and the City's alleged anticompetitive acts were not compelled by the State, only the third test is relevant to this petition.

This Court has long held that exemptions to the antitrust laws are to be narrowly construed, *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231, *reh'g denied*, 441 U.S. 917 (1979), and immunity under the state action doctrine is no exception. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398-400 (1978). The Ninth Circuit's decision departs from this rule and the teaching of the *City of Boulder, City of Lafayette, Midcal* and *Ronwin* line of cases. Rather than probing for evidence that the City's acts were in reality those of the State of California, the court rejected the only two measures of the State's presence and interest – specific State authorization of the local restraint or active supervision by the State. Instead, the court held that:

(1) The legislature's implied general grant of authority over taxicabs to municipalities (although devoid of any guidance) is sufficient to meet the "clearly articulated and affirmatively expressed" requirement; and

(2) The "active state supervision" requirement is inappropriate where a city is engaged in a traditional municipal function.

Even a superficial review of the statutory scheme at issue reveals that the constitutional and statutory provisions cited as evidence of a clear articulation of state policy to displace competition are, at best, evidence of a scheme of neutrality. *City of Boulder*, 455 U.S. at 55. The legislature has articulated no standards for the City to follow and has left the City free

to regulate as it sees fit – a clear invitation for the City to make choices based on its own parochial interests rather than as an agent of the sovereign. *City of Lafayette*, 435 U.S. at 408. Surely it cannot be said that the State contemplated what is alleged here; namely, that the City would exercise its franchising power to regulate labor disputes and to implement a conspiracy in league with both labor and private commercial interests.

Notwithstanding a glaring insufficiency in the expression of state policy, the court also held that the second prong of the state action immunity test – active state supervision, *see Midcal Aluminum*, 445 U.S. at 105 – was unnecessary where the regulation is "a traditional municipal function," 726 F.2d at 1434. This holding is particularly inappropriate in light of the "blank check" statutory scheme noted above, for it eliminates the only other method by which the nature and extent of the State's authorization of the City's actions can be determined.

Finally, because the Ninth Circuit chose to treat the issue before it as involving solely the City's general authority to regulate taxicabs and not whether that authority contemplated the specific restraints alleged in petitioner's complaint, the Ninth Circuit's analysis amounts to no more than a rubber stamp of the City's conduct. Under the court's formulation a vague grant of regulatory authority, unaccompanied by any specific state guidance, would insulate from the federal antitrust laws any restraint that, to any degree, depended upon municipal action for implementation. In short, the court's holding effectively overrules *City of Boulder*.

In deciding how to determine whether a city's actions are tantamount to the state's for purposes of state action immunity, this Court may decide to relax the active supervision requirement where the state's statutory scheme is sufficiently detailed. Alternatively, this Court may decide to require active state supervision where the statutory scheme lacks specificity. But it would be a major departure from the principles of *City of Boulder* for the Court to abandon both requirements, as the Ninth Circuit has done.

II. PREEMPTED LOCAL CONDUCT IS NECESSARILY BEYOND THE CONTEMPLATION OF THE LEGISLATURE AND THUS NOT ENTITLED TO *PARKER* IMMUNITY

In order for a municipality to retain *Parker* immunity, "the anticompetitive conduct of the state's representative [must have been] contemplated by the state." *Hoover* v. *Ronwin*, 104 S. Ct. at 1995, *citing City of Lafayette*, 435 U.S. at 413-15. Consistent with this standard, it cannot be presumed that a legislature would contemplate implementation of a general grant of authority through unconstitutional local action. Yet, in this case it is alleged that the City, at the behest of its co-conspirators, used its franchising power to regulate a peaceful work stoppage and thereby determine the outcome of a labor dispute – conduct which is plainly preempted by the National Labor Relations Act. The dismissal by the lower courts of petitioner's antitrust complaint without regard to whether unconstitutional preempted municipal conduct can qualify for state action immunity was error.[9]

As described above, the City plainly sided with the Teamsters in denying Golden State's franchise renewal. Members of

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[9] As noted previously, *supra* at n.4, the Ninth Circuit first considered the preemption issue in a preliminary injunction context. *Golden State Transit Corporation* v. *City of Los Angeles*, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 729 (1983). After the constitutional claims were remanded to the district court, summary judgment was granted in favor of the City on October 18, 1983 and that decision is now on appeal to the Ninth Circuit. Judicial consideration of the antitrust claims proceeded on a separate track with district court dismissal occurring on April 29, 1983, *Golden State Transit Corporation* v. *City of Los Angeles*, 563 F. Supp. 169 (C.D. Cal. 1983), and Ninth Circuit affirmance on February 28, 1984, *Golden State Transit Corporation* v. *City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984). In consequence of the procedural history of this case, the antitrust and constitutional issues were never litigated simultaneously in the same court. Given the disposition of Golden State's antitrust claims below, however, petitioner has no choice but to raise for the Court's consideration the question whether the lower courts can ignore the unconstitutionality of local conduct in deciding state action immunity issues.

the City Council accused Golden State of causing the strike by bargaining in bad faith, and publicly stated that Golden State's franchise would not be renewed unless the Teamsters' strike was settled. Requiring Golden State to accede to the demands of the Teamsters was unconstitutional for two distinct reasons.

First, conditioning Golden State's franchise to do business upon settlement of a strike is direct regulation of a labor dispute. This Court has repeatedly made clear, most recently in *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 147 (1976), that under federal law both union and employer have the right to resort to economic weapons, and that neither state nor federal bodies can determine what economic weapons are permissible. The City of Los Angeles did not have the right, in the use of its franchising authority, to force Golden State to abandon its attempt to secure a favorable labor agreement.[10] Numerous courts have held far less direct attempts to regulate

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[10] The Ninth Circuit's earlier decision, 686 F.2d 758 (9th Cir. 1982), erred by analyzing this case under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). In the *Lodge 76* case, this Court held that there are two separate branches of the preemption doctrine, one based upon the NLRB's primary jurisdiction and one based upon the notion that Congress affirmatively insulated certain conduct from all regulation. This case plainly falls within the latter category, not the former as found by the lower court. Moreover, the lower court's reliance upon a broad "state and local highways" exception to preemption was plainly wrong. This Court has repeatedly made it clear that a state cannot directly regulate the labor relations of private transit companies. *See, e.g., Division 1287, Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963) (governor cannot seize control of bus lines during labor dispute); *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees, Division 998* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951) (Wisconsin statute prohibiting strikes by private transit employees preempted and unenforceable); *compare Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942) (state power over highways allows it to prevent violence or mass picketing). There was no violence in this case, and thus no occasion for resort to the state's police power.

strikes unconstitutional because preempted by federal labor laws.[11]

Second, this Court has repeatedly made clear that neither federal nor local tribunals may dictate, either directly or indirectly, the terms of a collective bargaining agreement. Section 8(d) of the Taft-Hartley Act, 29 U.S.C. § 158(d), expressly states that neither employer nor union is obliged to agree to any proposal in bargaining, and this clause was inserted into the statute to preclude just such a judgment on the merits of the parties' stance in bargaining as has occurred here. *See generally NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 485-87 (1960). Under federal law, " . . . Congress intended that the parties should have wide latitude in their negotiations, *unrestricted by any governmental power to regulate the substantive solution of their differences.*" *Id.* at 488 (emphasis added). *See also H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959).

Federal labor law thus affirmatively preempts state and federal regulation of economic warfare, and direct or indirect dictation of the terms of labor agreements. In this case, the City of Los Angeles transgressed this principle by using its

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[11] *See, e.g., OCAW Local 5-283* v. *Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964) (state arbitration board forbidden to investigate and make public report on causes of lengthy strike, as this would impact upon federally preempted area); *General Electric Co.* v. *Callahan*, 294 F.2d 60 (1st Cir. 1961) (same holding where governor of Massachusetts requested state board to investigate dispute), *cert. dismissed*, 369 U.S. 832 (1962); *Delaware Coach Co.* v. *Public Service Commission*, 265 F. Supp. 648 (D. Del. 1967) (attempt of city and county to procure revocation of bus company's license because of lengthy strike enjoined as preempted); *Cab Operating Corp.* v. *City of New York*, 243 F. Supp. 550 (S.D.N.Y. 1965) (attempt by mayor of New York to mediate taxi strike enjoined as preempted); *Grand Rapids City Coach Lines, Inc.* v. *Howlett*, 137 F. Supp. 667 (W.D. Mich. 1955) (injunction against investigation and publication of report on strike); *cf. New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979) (state unemployment statute not preempted because statute one of general applicability in area where Congress intended to tolerate state regulation).

franchising powers, at the behest of the Teamsters and Golden State's competitors, to intervene on the side of one participant in a labor dispute. In so doing, the City violated the fundamental precept that government at any level must remain neutral with regard to the substantive terms of bargaining.

This Court has not yet decided whether a municipality's unconstitutional conduct can be deemed an act contemplated by the state, and thus within the "state action" immunity doctrine. In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court held that a disciplinary rule restricting attorney advertising violated the First Amendment. The Court also held that because the real party in interest was the Supreme Court of Arizona, *Parker* immunity applied. However, in *Bates* the Court did not reach the question presented here: whether preempted municipal conduct can qualify for state action immunity. This issue is of particular significance where, as in this case, the State has established no standards to guide, and no mechanism to supervise, the City's actions.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 83-5903
DC No. 81-1519-AAH (GX)

GOLDEN STATE TRANSIT CORPORATION,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES,
Defendant-Appellee.

OPINION

Appeal from the United States District Court for the Central District of California

Hon. Cynthia Holcomb Hall, District Judge, Presiding

Argued and submitted November 7, 1983

Decided February 28, 1984

Before: BROWNING and NORRIS, Circuit Judges, and SOLOMON,* District Judge.

SOLOMON, Judge:

INTRODUCTION

Golden State Transit Corporation d/b/a Yellow Cab of Los Angeles (Yellow Cab) brought this action against the City of Los Angeles (City) when the City refused to renew Yellow Cab's taxicab franchise. Yellow Cab sought a preliminary injunction and moved for partial summary judgment contending that the City committed a per se violation of section 1 of the

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Sherman Act, 15 U.S.C. § 1. The district court denied both requests and instead granted the City a partial summary judgment dismissing Yellow Cab's antitrust claim.[1] The district court based both decisions on its conclusion that the City was protected from antitrust liability by the *Parker* doctrine. *Parker v. Brown*, 317 U.S. 341 (1943).

PROCEDURAL HISTORY

In 1981, when Yellow Cab filed this action against the City, it did not allege antitrust violations. Instead, it alleged that the City's refusal to renew its taxicab franchise violated the Supremacy Clause and also deprived it of due process and equal protection of the law in violation of 42 U.S.C. § 1983. In that proceeding, the district court granted a preliminary injunction which prevented the City from terminating Yellow Cab's franchise. This court reversed. *Golden State Transit v. City of Los Angeles*, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983). We held that Yellow Cab had little likelihood of success on the merits.

On remand, Yellow Cab amended its complaint to include a cause of action alleging that the City violated section 1 of the Sherman Act, 15 U.S.C. § 1. Yellow Cab again moved for a preliminary injunction. It also requested a partial summary judgment on its contention that the City's regulations constituted a per se violation of section 1 of the Sherman Act.

The district court denied the request for a preliminary injunction. It held that Yellow Cab was not likely to succeed on the merits of its antitrust cause of action because the City was not subject to federal antitrust laws under the *Parker* doc-

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[1] The City did not move for summary judgment. Nevertheless, a court may on its own grant summary judgment in favor of a non-moving party if it appears that the moving party could not prevail even if a trial were held. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982).

trine. Based on the *Parker* doctrine, the district court also denied Yellow Cab's motion for partial summary judgment. Instead, the court granted the City partial summary judgment.[2]

FACTS

Yellow Cab operates a taxicab company in Los Angeles. Taxicab operators must have a franchise which may only be granted by the City. Los Angeles Administrative Code § 13.4, [Los Angeles Municipal Code §] 71.02(b). Applications for a franchise are first reviewed by the City's Board of Public Utilities and Transportation. The Board then makes recommendations to the City Council. Los Angeles City Charter § 211. The City Council ultimately decides whether to grant an application.

All thirteen of the taxicab franchises in Los Angeles expired in 1980, and all of the franchise holders applied to the City for renewal. The City temporarily extended all of the franchises for five months to give it time to evaluate the applications. The franchise of Yellow Cab permitted it to operate 363 cabs, approximately 30% of the total in the City. The Board recommended that the City Council renew Yellow Cab's franchise. Before the Council acted, the Teamsters struck the company and requested the City Council members and other city officials to withhold Yellow Cab's franchise until Yellow Cab entered into a new collective bargaining agreement with the Teamsters. After a hearing, the City Council voted 11-1 to deny Yellow Cab's application for renewal.[3]

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[2] Yellow Cab's causes of action alleging violations of the Supremacy Clause and the Due Process Clause are pending before the district court. The district court entered an appropriate certification on the partial summary judgment under Rule 54(b) of the Federal Rules of Civil Procedure, and the order is therefore a final one appealable under 28 U.S.C. § 1291.

[3] The Council followed the Board's recommendation on every application except that of Yellow Cab.

In addition to controlling the number of taxicab franchises, the City sets the rates charged by all of the taxicabs in the City. It refused to approve Yellow Cab's requested increase, but it approved all of the increases requested by Yellow Cab's competitors. The City contends that it did not grant the increase because Yellow Cab failed to submit the required financial information.

Yellow Cab has not operated in the City since May, 1983.

DISCUSSION

The parties agree that whether federal antitrust restrictions apply to the City is a question of law to be reviewed *de novo*.

In *Parker v. Brown, supra*, the Supreme Court held that federal antitrust laws do not apply to a restraint of trade imposed as 'an act of government' by the state 'as sovereign.' 317 U.S. at 352. In that case, the State of California adopted a program to regulate the state's raisin crop which kept the price of raisins artificially high and which prevented the appellee from freely marketing his crop in interstate commerce.

Thereafter, the Court analyzed the application of *Parker* to states and state agencies. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the issue was whether the *Parker* doctrine applied to cities. The City of Lafayette brought an action against utility companies, and the companies counterclaimed alleging antitrust violations. The plurality opinion held that cities, "simply by their status as such, are not within the *Parker* doctrine," but that anticompetitive conduct may be exempt from antitrust regulation when a city acts "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The plurality opinion emphasized that state policy pursued by the city must be "clearly articulated and affirmatively expressed." *Id.* at 410.

In *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982), a majority of the Court adopted this standard. The city was organized as a "home rule" municipality under the state constitution which gave it "extensive powers of self-government in local and municipal matters . . ." 455 U.S. at 43. The city granted the petitioner a non-exclusive contract to provide cable television service to a limited section of the city. The state constitution placed no restrictions on what the City could do in its regulation of cable television, and the state did not regulate the field. The city later enacted a temporary moratorium on cable services that prohibited the petitioner from expanding to other parts of the city. The petitioner sought to enjoin the moratorium on the ground that it violated section 1 of the Sherman Act. The city contended that under the *Parker* doctrine it was not subject to antitrust restraints.

The Court held that the city could not avail itself of the *Parker* doctrine because the state's "mere neutrality respecting the municipal actions challenged as anticompetitive," 455 U.S. at 55, did not satisfy the requirement of a clearly articulated and affirmatively expressed state policy. The state, when it gave the city home rule powers which permitted it to do as it pleased, was merely neutral.

To prove that a policy is clearly articulated and affirmatively expressed, the City must demonstrate not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of actions alleged to be anticompetitive. *Parks v. Watson*, —— F.2d ——, Nos. 80-3416, 80-3458, slip op. at 4647 (9th Cir. Sept. 22, 1983) (per curiam). Both tests are satisfied here.

The district court relied on the California Constitution and on the Public Utility Code as evidence of a state policy to displace competition with regulation.

Under the state constitution, taxicabs and their owners are classified as public utilities which may be controlled by the state legislature. Cal. Const., art XII, § 3. In addition, the Public Utilities Commission "may fix rates and establish rules for transportation of passengers and property by transportation companies. . . ." Cal. Const., art XII, § 4.

The legislature has exercised control over taxicabs in the Passenger Charter-Party Carriers' Act, Cal. Pub. Util. Code §§ 5351 *et seq.* Under the Act, a carrier (which includes taxicabs) must obtain a certificate of public convenience and necessity. *Id.* § 5371. To obtain a certificate, a carrier must pay a filing fee and an application fee, §§ 5373, 5373.1, and must establish its fitness and financial responsibility, §§ 5374, 5391. An application to operate in an area already served by a certificate holder is available only if the applicant proves that the existing service is not satisfactory and adequate. § 5375.1. The Act contains detailed provisions for cancellation, revocation or suspension of a certificate. § 5378. It specifies the methods a carrier may use to compute its charges to a customer. § 5401. It sets forth fines and penalties for violation of the Act. §§ 5411-5419.

Appellant argues that the California Court of Appeal in *People v. City and County of San Francisco*, 92 Cal.App.3d 913, 155 Cal.Rptr. 319 (1979), precludes the conclusion that the Passenger Charter-Party Carriers' Act articulates a clear state policy in favor of taxicab regulation. *City and County of San Francisco* held that a municipality has the authority to set taxicab fares. We agree with the holding but do not agree with the reasoning of the state court of appeals. The court found that the statute did not grant the state commission any authority over taxicabs and that cities could determine whether

to regulate taxicabs. *See City and County of San Francisco*, 92 Cal.App.3d at 924, 155 Cal.Rptr. at 326. Relying on these court of appeal decisions, appellants argue that the state statute cannot be the source of a policy to displace competition with taxicab regulation. We disagree.

We believe that the California Supreme Court will interpret the statutory scheme differently than it did in its earlier decisions which interpreted statutes then in effect and upon which the California Court of Appeal relied. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Estrella v. Brandt*, 682 F.2d 814, 818 (9th Cir. 1982).

The California Supreme Court initially held that the state commission had no regulatory authority over taxicabs because, among other reasons, taxicabs were not specifically included in the statutory definition of a public utility or common carrier. *See In re Martinez*, 22 Cal.2d 259, 138 P.2d 10 (1943). Later, the California Supreme Court in *People v. Western Airlines Inc.*, 42 Cal.2d 621, 268 P.2d 723 (1954), rejected this analysis and held that an airline was a public utility even though not specifically listed in the statute. Nevertheless, the California Court of Appeal in *City and County of San Francisco* relied on *Martinez*. In *Martinez*, however, the Supreme Court interpreted a substantially different statute than the one now in effect. The provisions upon which the Supreme Court relied in *Martinez* are not part of the present statute. In addition, the statute analyzed in *Martinez* did not contain language comparable to that found in the present section 5353(g). We are convinced that the California Supreme Court will hold taxicabs are within the coverage of the Passenger Charter-Party Carriers' Act because taxicabs fit squarely within the statutory definition of a carrier sub-

ject to state regulation. *See* § 5360. We find no evidence of a legislative intent to exclude taxicabs from the statute's coverage. We believe that under section 5353(g) if a city does *not* license or regulate taxicabs, the state commission has the authority to do it. We do not believe that the California Supreme Court will interpret the statute to render this section meaningless as the court of appeal did in *City and County of San Francisco. See Estrella v. Brandt*, 682 F.2d at 818. If the statute is read to apply to taxicabs, as we believe it must be, we find a "clearly articulated and affirmatively expressed state policy" which allows municipalities to displace competition with regulation in the taxicab industry.

The final question is whether the City must show active state supervision to qualify for *Parker* immunity. We hold that it does not.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court adopted a two-part test to determine whether a state's involvement is sufficient to establish *Parker* immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as a state policy'; second, the policy must be 'actively supervised' by the state itself." 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410). In *Midcal*, a state statute authorized private wine wholesalers to file fair trade contracts or price schedules, and merchants were then required to sell to retailers at the set price. The state retained no direct control over the wine prices. The Court held that under the two-part test, the actions were not entitled to *Parker* immunity.

The Supreme Court has not reached the question of whether a city must meet the active state supervision part of the

Midcal test. *City of Boulder*, 455 U.S. at 51-52, n.14. The issue has not been presented in this circuit. Other circuits, however, have held that cities need not satisfy the second part of the *Midcal* test to establish *Parker* immunity when they perform a traditional municipal function under a clearly established and affirmatively expressed state policy. This is what Los Angeles did here when it franchised local public transportation utilities and regulated their charges. *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. Aug. 9, 1983) (No. 83-138); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3842 (U.S. May 24, 1983) (No. 82-1832). *See Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982).

We agree with those cases. Regulation of taxicabs is a traditional municipal function which other circuits have held exempt from active supervision. *See generally Grier v. Ferrant*, 62 Cal.App.2d 306, 144 P.2d 631, 635 (1944); 7 McQuillan, *Municipal Corporations* § 24.660 (3d ed. 1978); 9 McQuillan, *Municipal Corporations* § 26.173 (3d ed. 1978). We hold that a city need not prove active state supervision to be entitled to *Parker* immunity when it franchises taxicab companies and regulates taxicab fares within the city.

The state legislature has determined that public transportation by taxicab should be regulated and that preferably the regulation should be handled by local government. A requirement of active state supervision would erode local autonomy. It makes little sense to require a state to invest its limited resources in supervisory functions that are best left to municipalities. As Justice Rehnquist observed, "[i]t would seem

rather odd to require municipal ordinances to be enforced by the State rather than the City itself." *Community Communications Co. v. City of Boulder*, 455 U.S. at 71, n.6 (Rehnquist, J. dissenting).

CONCLUSION

The California Constitution and California's statutes show an affirmatively expressed and clearly articulated state policy to displace competition with regulation in the taxicab industry. The challenged actions of the City were taken pursuant to that policy and were contemplated by the legislature. That is sufficient to immunize the City from antitrust liability under *Parker v. Brown*. The district court did not err in denying Yellow Cab's request for a preliminary injunction and partial summary judgment or in dismissing the antitrust claims against the City of Los Angeles. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5903

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business
as Yellow Cab of Los Angeles,
Plaintiff-Appellant,

v.

CITY OF LOS ANGELES,
a municipal corporation,
Defendant-Appellee.

ORDER

Before: BROWNING, Chief Judge, NORRIS, Circuit Judge, and SOLOMON*, District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[Dated: May 14, 1984]

*Honorable Gus J. Solomon, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
No. CV 81-1519-CHH

GOLDEN STATE TRANSIT CORPORATION,
a California corporation, doing business
as Yellow Cab of Los Angeles,

Plaintiff,

v.

CITY OF LOS ANGELES,
a municipal corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following Findings of Fact and Conclusions of Law are entered in support of the Court's grant of partial summary judgment to defendant on the Fifth Cause of Action alleging violations of section 1 of the Sherman Act.

FINDINGS OF FACT

Plaintiff Golden State Transit Corporation is engaged in the business of operating taxicab service in the City of Los Angeles, California. Defendant City of Los Angeles (the "City") is a municipal corporation formed under the laws of the State of California. Ordinances enacted by the City require plaintiff, and other taxicab companies seeking to do business within the City, to obtain City licenses in order to operate. City ordinances also subject plaintiff, and other taxicab com-

panies operating in the City, to regulations relating to rates that passengers are charged and other conditions of business.

In March 1981, the Los Angeles City Council failed to renew plaintiff's operating franchise. Plaintiff has been operating without the licenses required by City regulations since April 1, 1981. This Court, per Judge Hauk, issued a preliminary injunction forbidding the City from terminating, or otherwise treating as expired, plaintiff's franchise. *Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191 (C.D. Cal. 1981), *vacated*, 686 F.2d 758 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983). Following the Supreme Court's denial of plaintiff's petition for writ of certiorari, this Court vacated the preliminary injunction. On March 28, 1983, plaintiff filed its Second Amended Complaint which repeats the Causes of Action set forth in the previous Complaints and adds a Fifth Cause of Action alleging violations of section 1 of the Sherman Act, 15 U.S.C. § 1. Following the filing of the Second Amended Complaint, the City voluntarily refrained from issuing a "Cease and Desist" order against plaintiff pending the Court's consideration of plaintiff's application for a preliminary injunction. The Court denied plaintiff's application for a preliminary injunction on April 28, 1983, and now enters Judgment in favor of defendant on the Fifth Cause of Action.

CONCLUSIONS OF LAW

Summary judgment is appropriate where the pleadings and other materials on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). On the instant motion, the parties agree that there are no disputes as to any material fact on the issue of Sherman Act immunity. In the absence of any factual issues, the Court may grant summary judgment to either party without requiring that a cross-

motion be filed. *Factora v. District Director, Immigration & Naturalization Service*, 292 F. Supp. 518, 521 (C.D. Cal. 1968).

Plaintiff's Fifth Cause of Action alleges that defendant has "engaged in a combination, contract, and conspiracy unreasonably in restraint of interstate trade and commerce" in violation of section 1 of the Sherman Act. Specifically, plaintiff points to the City's refusal to extend and renew plaintiff's taxicab franchise; its refusal to approve rate increases in the full amount requested by plaintiff; and its refusal to allow plaintiff to lease its taxicabs to independent contractors rather than hire employee drivers to operate them. Defendant does not dispute the assertion that it has imposed these restrictions on plaintiff's business; instead, it contends that it cannot be held liable for any damages that might result from its regulatory and licensing activities.

The threshold issue presented in plaintiff's Fifth Cause of Action is whether defendant enjoys the "state action" exemption from Sherman Act liability articulated in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases. As the Supreme Court recently stated in *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 838, 841 (1982):

> Our precedents thus reveal that [a municipal] ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State . . . itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette, Orrin W. Fox Co.*, and *Midcal*.

Community Communications makes it apparent that the requirement of "clear articulation and affirmative expression" requires a showing that the State's position is not one of "mere neutrality." In applying this test to the Colorado Home

Rule Amendment, the *Community Communications* Court held that a guarantee of local autonomy alone did not affirmatively express a State policy to displace competition with local regulation.

> A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State.

102 S. Ct. at 843 (emphasis in the original).

In contrast to the statutory scheme at issue in *Community Communications*, the City of Los Angeles' regulatory authority stems from the Constitution and Public Utilities Code of the State of California. The California Constitution authorizes state regulation of taxicabs and their owners. Cal. Const., art. XII, § 4. The Legislature has asserted the power to control taxicab operations through enactment of Chapter 8 of the Public Utilities Code. Pub. Util. Code § 5351 *et seq*. Specifically, Chapter 8 applies to any "charter-party carrier of passengers," which includes "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this State." *Id*., § 5360. Plaintiff's taxicab operations clearly fall within this definition of utilities subject to state regulation of fares and other conditions of operation. The Public Utility Code provides, however, that taxicabs are not subject to state regulation if a municipal subdivision licenses and regulates such operations. *Id*. § 5353(g). In short, the Public Utilities Code delegates to the City of Los Angeles the power to license and regulate taxicab operations within its boundaries. If the

City fails to exercise its regulatory power, the Public Utilities Commission is obligated to act in the City's place. *See People v. City & County of San Francisco*, 92 Cal. App. 3d 913, 921-25, 155 Cal. Rptr. 319, 324-26 (1979).

The City's regulatory and licensing system is, therefore, part and parcel of the overall scheme of public utilities regulation established under state law. The State of California has clearly articulated and affirmatively expressed a policy of displacing competition with regulation in the taxicab industry. Although state law does not compel the City to exercise this power, this fact alone does not subject it to antitrust liability.

> [A] political subdivision [need not] necessarily . . . point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978). In this case, the antitrust laws cannot be invoked to stymie the "legitimate exercise of governmental power," *Id.* at 416, directed at "a 'traditionally local matter' left to state and local regulation . . . ." *Golden State Transit, supra*, 686 F.2d at 760, *quoting Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

Having satisfied the burden of showing that the State of California has clearly articulated and affirmatively expressed a policy to displace competition with regulation, the City must next demonstrate that the State actively supervises the imple-

mentation of the restraint. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U.S. 97 (1980). Unlike the retail price maintenance scheme invalidated in *Midcal*, the City regulates the taxicab operations directly rather than delegating that responsibility to private parties. *See id.* at 105-06; *see also United States v. Title Insurance Rating Bureau*, 700 F.2d 1247 (9th Cir. 1983). Direct regulation by the City satisfies the "active supervision" requirement established for antitrust immunity. *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Midcal, supra*, 445 U.S. at 106 & n.9.

By satisfying both parts of the two-fold "state action" immunity test, defendant City of Los Angeles cannot be subjected to Sherman Act liability for its failure to renew plaintiff's operating franchise. Since the Sherman Act does not reach the City's conduct, the defendant is entitled to judgment on all claims arising under that statute.

Dated: April 29, 1983.

Cynthia Holcomb Hall
United States District Judge

APPENDIX D

UNITED STATES CONSTITUTION

ARTICLE VI, CLAUSE 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

SHERMAN ANTITRUST ACT, SECTION 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 26 Stat. 209 as amended, 15 U.S.C. Section 1 (1976).

CALIFORNIA CONSTITUTION

ARTICLE XII

§3. Classification; control by legislature; additional clauses

Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage

directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

§4. Transportation of passengers and property; rates, rules; increases

The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

CALIFORNIA PUBLIC UTILITIES CODE*

§5351. Citation

This chapter may be cited as the Passenger Charter-Party Carriers' Act.

§5353. Exclusions

This chapter does not apply to any of the following:

(a) Transportation service rendered wholly within the corporate limits of a single city or city and county.

(b) Transportation of school pupils conducted by or under contract with the governing board of any school district entered into pursuant to the Education Code.

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* This portion of Appendix D sets forth the current language of the relevant Public Utilities Code sections. On no point for which these Code sections were cited by the courts below, or by the petitioner here, does this language differ from the language in effect at the time of the events described in the Statement of the Case, *supra*.

(c) Common carrier transportation services between fixed termini or over a regular route which are subject to authorization pursuant to Article 2 (commencing with Section 1031) of Chapter 5 of Part 1 of Division 1.

(d) Transportation services occasionally afforded for farm employees moving to and from farms on which employed when the transportation is performed by the employer in vehicles owned or leased by him, or by a nonprofit agricultural cooperative association organized and acting within the scope of its powers under Chapter 1 (commencing with Section 54001) of Division 20 of the Food and Agricultural Code, and without any requirement for the payment of compensation therefor by the employees.

(e) Transportation service rendered by a publicly owned transit system.

(f) Passenger vehicles carrying passengers on a noncommercial enterprise basis.

(g) Taxicab transportation service licensed and regulated by a city or county, by ordinance or resolution, rendered in vehicles designed for carrying not more than eight persons excluding the driver.

(h) Transportation of persons between home and work locations or of persons having a common work-related trip purpose in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver. This exemption does not apply if the primary purpose for the transportation of those persons is to make a profit. "Profit," as used in this subdivision, does not include the recovery of the actual costs incurred in owning and operating a vanpool vehicle, as defined in Section 668 of the Vehicle Code.

(i) Medical transportation vehicles.

(j) Transportation services rendered solely within the Lake Tahoe Basin, comprising that area included within the Tahoe Regional Planning Compact as set forth in Section 66801 of the Government Code, when the operator of the services has obtained any permit required from the Tahoe Basin Transportation Authority or the City of South Lake Tahoe, or both.

§5360. "Charter-party carrier of passengers"

Subject to the exclusions of Section 5353, "charter-party carrier of passengers" means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this State.

§5371. Necessity of certificate or permit

No charter-party carrier of passengers excepting transit districts, transit authorities or cities owning and operating local transit systems themselves or through wholly owned nonprofit corporations shall engage in transportation services made subject to this chapter without first having obtained from the commission a certificate that public convenience and necessity require such operation, except that certain specific transportation services as defined in Section 5384 may be conducted under authority of an annual permit issued by the commission.

§5373. Filing fee; annual application for permit; annual certificate renewal fee

Each annual application for a permit to act as a charter-party carrier of passengers pursuant to the provisions of this chapter shall be accompanied by a filing fee of fifty dollars ($50). Each certificate to act as a charter-party carrier of passengers shall be accompanied by an annual renewal fee of one hundred dollars ($100).

§5373.1 Filing fee; initial application for certificate or permit

Each initial application for a certificate or permit shall be accompanied by a filing fee of:

(a) Class A certificates—five hundred dollars ($500).

(b) Class B certificates—two hundred dollars ($200).

(c) Permits, one hundred dollars ($100).

§5374. Establishment of fitness and financial responsibility.

Before an annual permit or certificate is issued, the commission shall require the applicant to establish reasonable fitness and financial responsibility to initiate and conduct the proposed transportation services.

§5375.1 Operation in territory already served by certificate holder

Notwithstanding the provisions of Section 5375, if the applicant desires to operate in a territory already served by the holder of a certificate, the commission shall hold a hearing before granting the certificate. The commission shall not grant a certificate to such an applicant unless it can be shown that the existing charter-party carrier of passengers serving the territory is not providing services which are satisfactory to the commission and adequate for the public. In no event shall the commission issue more certificates than public convenience and necessity require and the commission shall place any restrictions upon such certificates as may reasonably be necessary to protect any existing charter-party carrier of passengers.

§5378. Cancellation, revocation or suspension of permit or certificate

The commission may cancel, revoke, or suspend any operating permit or certificate issued pursuant to the provisions of this chapter upon any of the following grounds:

(a) The violation of any of the provisions of this chapter, or of any operating permit or certificate issued thereunder.

(b) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission pursuant to this chapter.

(c) The conviction of the charter-party carrier of passengers of any misdemeanor under this chapter.

(d) The rendition of a judgment against the charter-party carrier of passengers for any penalty imposed under this chapter.

(e) The failure of a charter-party carrier of passengers to pay any fee imposed upon the carrier within the time required by law.

(f) On request of the holder of the permit or certificate.

(g) Failure of a permit or certificate holder to operate and perform reasonable service.

§5391. Insurance

The commission shall, in granting permits or a certificate pursuant to this chapter, require the charter-party carrier of passengers to procure, and to continue in effect during the life of the permit or certificate, adequate protection against liability imposed by law upon the charter-party carrier of passengers for the payment of damages for personal bodily injuries, including death resulting therefrom, protection against a total liability of the charter-party carrier of passengers on account of bodily injuries to, or death of, more than one person as a result of any one accident, and protection against damage or destruction of property. The minimum requirements for such assurances of protection against liability shall not be less than the requirements which are applicable to operations conducted under certificates of public convenience and necessity issued pursuant to the provisions of Article 2 (commencing with Section 1031),

Chapter 5, Part 1, Division 1, of this code, and the rules and regulations prescribed pursuant thereto shall apply to charter-party carriers of passengers.

§5401. Mileage and time of use; individual fares prohibited

Charges for the transportation to be offered by a charter-party carrier of passengers shall be computed and assessed on a vehicle mileage or time of use basis, or on a combination thereof, which charges may vary in accordance with the passenger capacity of the vehicle, or the size of the group to be transported, but it shall not be lawful for a charter-party carrier of passengers to directly or through his agent, or otherwise, or for a broker, to contract, agree, or arrange to charge or to demand or receive compensation for the transportation offered or afforded which shall be computed, charged, or assessed on an individual-fare basis, except schoolbus contractors who are compensated by parents of children attending public, private, or parochial schools.

§5411. Carrier violations; offense; punishment

Every charter-party carrier of passengers and every officer, director, agent, or employee of any charter-party carrier of passengers who violates or who fails to comply with, or who procures, aids, or abets any violation by any charter-party carrier of passengers of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit or certificate issued to any charter-party carrier of passengers, or who procures, aids, or abets any charter-party carrier of passengers in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit or certificate, is guilty of a misdemeanor and is punishable by fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail for not more than three months, or both.

§5412. Non-carrier violations; offense; punishment

Every corporation or person other than a charter-party carrier of passengers, who knowingly and willfully, either individually, or acting as an officer, agent, or employee of a corporation, copartnership, or any other person other than a charter-party carrier of passengers, violates any provision of this chapter or fails to observe, obey, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or who procures, aids, or abets any charter-party carrier of passengers in its violation of this chapter, or in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, or requirement, is guilty of a misdemeanor, and is punishable by a fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail for not more than three months, or both.

§5413. Carrier violations; penalty

Every charter-party carrier of passengers and every officer, director, agent, or employee of any charter-party carrier of passengers who violates or who fails to comply with, or who procures, aids, or abets, any violation by any charter-party carrier of passengers of any provision of this chapter, or who fails to obey, observe, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or of any operating permit or certificate issued to any charter-party carrier of passengers, or who procures, aids, or abets any charter-party carrier of passengers in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, requirement, or operating permit, or certificate, is subject to a penalty of not more than five hundred dollars ($500) for each offense.

§5414. Non-carrier violations; penalty

Every corporation or person other than a charter-party carrier of passengers who knowingly and willfully, either individually, or acting as an officer, agent, or employee of a corporation, copartnership, or any other person other than

a charter-party carrier of passengers, violates any provision of this chapter or fails to observe, obey, or comply with any order, decision, rule, regulation, direction, demand, or requirement of the commission, or who procures, aids, or abets any charter-party carrier of passengers in its violation of this chapter, or in its failure to obey, observe, or comply with any such order, decision, rule, regulation, direction, demand, or requirement, is subject to a penalty of not more than five hundred dollars ($500) for each offense.

§5415. Separate offenses

Every violation of the provisions of this chapter or of any order, decision, decree, rule, direction, demand, or requirement of the commission by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof is a separate and distinct offense.

§5416. Cumulative penalties

All penalties accruing under this chapter are cumulative, and a suit for the recovery of one penalty does not bar or affect the recovery of any other penalty or forfeiture or bar any criminal prosecution against any person or corporation, or any officer, director, agent or employee thereof, or any other corporation or person, or bar the exercise by the commission of its power to punish for contempt.

§5417. Penalty action; plaintiff; venue

Actions to recover penalties under this chapter shall be brought in the name of the people of the State of California, in the superior court of the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of, if any, has its principal place of business, or in which the person, if any, complained of, resides. The action shall be commenced and prosecuted to final judgment by the attorney of the commission.

§5418. Penalty action; scope; procedure

In any such action, all penalties incurred up to the time of the commencement of the action may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions.

§5419. Penalties; disposition; compromise

All penalties recovered by the State in any action pursuant to this chapter, together with the costs thereof, shall be paid into the State Treasury to the credit of the General Fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court approves and orders.

LOS ANGELES CITY CHARTER

Sec. 210. The Board of Public Utilities and Transportation shall have the following powers and duties:

(1) To investigate all privately owned public utilities in the City of Los Angeles (except utilities at the harbor placed by this charter under the jurisdiction of the Harbor Department) and compile such data as may be necessary to determine the proper services to be furnished by such utilities or the charges to be made therefor. The board shall have the right to access at all reasonable times to the property and records of said utilities for the purpose of investigation and may require reports respecting said matters from such utilities at such time and in such form as said board may prescribe.

(2) To establish and prescribe by resolution regulations providing for the operation of, the extent, character and quality of service, the rates to be charged by and the extensions to be required of, any said utility, all in a manner not in conflict with any paramount regulation, rate fixing or extension requirements for any such utility by the state or nation. The secretary of the board shall publish once in the official newspaper a certified copy of every such proposed regulation, tentatively approved by the board, together with a notice to any and all persons to show cause, if any, within five days from the date of publication of said notice, why the proposed regulation should not be made effective. Any person interested in or affected by the proposed regulation may, within five days after the expiration of such publication, file objections thereto with the secretary of the board, specifying the grounds of such objections. The secretary shall lay all such objections before the board at its next regular meeting after the expiration of the time for filing the same, and the board shall then fix a date, not less than five days later, for hearing

any and all objections, and shall, after said hearing, finally act on said proposed regulation by approving, changing or rejecting the same, providing that any resolution of the board approving any such regulation shall be published once before becoming effective and shall be subject to the referendum provisions of this charter relating to ordinances. Any resolution fixing rates must be approved by the Council, by ordinance, before taking effect.

(3) To investigate complaints against the services or charges of any said utility and to make orders adjusting the same.

(4) To inspect all such utilities as to their compliance with their franchises, the ordinances of the city and the laws of the state, and as to their service generally; and to enforce in the manner prescribed by law a compliance with the terms of such franchises and ordinances or laws applicable thereto.

(5) To keep a record of all public utility franchises granted by the city or exercised therein.

Sec. 211. Every application made to or granted by the Council for a franchise for any public utility (except utilities at the harbor placed by this charter under the jurisdiction of the Harbor Department), shall, before any action is taken thereon, be referred by the Council to the Board of Public Utilities and Transportation of its recommendation respecting the same. Said board shall proceed to inquire into such application or grant and, within thirty days after such application or grant has been referred to it, or longer if allowed by the Council, shall report to the Council its recommendations relative thereto. If, in the judgment of the board, such application or grant should not be advertised for sale or granted, it shall so report, stating its reasons therefor; and if, in the judgment of the board, such application or grant should be granted, it

shall recommend the terms and conditions upon which the same should be so granted. No franchise shall be advertised for sale or granted unless such application or grant shall have been referred to the Board of Public Utilities and Transportation as aforesaid; provided, however, that if said board shall fail to report thereon within the time herein prescribed, or as extended by the Council, nothing herein contained shall be construed to prevent the Council, in its discretion, from proceeding to advertise such franchise for sale, or from awarding or granting the same, as provided by law. No franchise shall be advertised for sale or granted contrary to the recommendations of said board except upon a three-fourths vote of the entire Council.

Sec. 212. The term "public utility," as used in this charter, is hereby defined as including the following:

(1) Any public service declared by the Constitution or statutes of the State of California or the decisions of the federal or state courts, to be a public utility;

(2) The operation of vehicles for hire, regardless of the form of transportation;

(3) Any public service declared to be a public utility by the Council by ordinance which the city has authority to adopt.

LOS ANGELES ADMINISTRATIVE CODE

Sec. 13.4 Applicability.

No person, firm or corporation shall exercise any franchise, permit or privilege mentioned in this chapter except in so far as such person, firm or corporation may be entitled to do so by direct and unlimited authority of the Constitution of the State of California or of the Constitution or laws of the United States, in, upon, over, under or along any street, highway or

other place in the City of Los Angeles unless such person, firm or corporation shall have obtained a grant therefor in accordance with the provisions of the Charter of said City and of the procedure prescribed by this chapter, and in accordance with the provisions of the chapter granting such franchise, permit or privilege.

LOS ANGELES MUNICIPAL CODE

Sec. 71.02 Operation of Vehicles—Permits or Franchises required:

(a) No person shall operate or use, whether as owner, lessor, lessee or otherwise, any of the vehicles defined in Section 71.00, or allow or permit to be operated or used, whether as owner, lessor, lessee, or otherwise, any of the vehicles defined in Section 71.00 unless a written vehicle permit for the operation of such specifically defined vehicles has been obtained from the board; provided, however, that no vehicle permit shall be required for the operation of any vehicle under and in accordance with the terms and conditions of a franchise granted by the City of Los Angeles. (Amended by Ord. No. 149,526, Eff. 5/21/77.)

(b) No person shall operate taxicabs without a franchise granted by the City of Los Angeles, except that the Board may grant to an individual a non-transferable vehicle permit to operate a single taxicab subject to the permittee being a member of, and operating as a part of an association, whether incorporated or not, and subject to said association having entered into a revocable agreement with the Board to provide taxicab service in the City of Los Angeles under terms and conditions as established by the Board. (Amended by Ord. No. 151,833, Eff. 2/10/79, Oper. 2/25/79.)

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No. 84-378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GOLDEN STATE TRANSIT CORPORATION,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 84-378

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SUPREME COURT OF THE UNITED STATES

October Term, 1984

GOLDEN STATE TRANSIT CORPORATION,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, City of Los Angeles, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in the case. The case is reported in 726 F.2d 1430 (9th Cir. 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions referred to by Petitioner the following are also involved. Los Angeles City Charter Sec. 3(8)(D).

STATEMENT OF THE CASE

The Respondent takes issue with Petitioner's "Statement of the Case" as to several assertions.

The City is not engaged in the taxicab business. It does not operate any taxicabs. Rather it authorizes the use of City streets for taxicab operations by one of two ways. Los Angeles Municipal Code, Sec. 71.02(b), (A-31, Petition). Golden State Transit dba Yellow Cab operated taxicabs pursuant to a franchise granted by the

City. Los Angeles Administrative Code, Sec. 13.4 (A-30, Petition). The City also issues vehicle permits to individuals for the operation of taxicabs.

The City also sets taxicab rates. In setting rates the City does not automatically allow a taxicab operator to charge such rates as it wishes. Rather the operator submits an application to the City and the City, based on its own independent evaluation and analysis, establishes the rate, (CR 75).

Taxicab franchises are granted by the City for a particular area of the City for a fixed term, the initial term being by competitive bidding (CR 74, Exhibit "A"). There is no provision in the franchise for an extension. The Los

Angeles City Charter Sec. 3(8)(D) provides in part:

> "The City may, by ordinance . . . grant to the holder of such franchise a new franchise to replace such franchise about to expire." Golden State Transit v. City of Los Angeles, 686 F.2d 758, 760(4) (9th Cir., 1982) (See fn. 4 to Petition, p.4.)

Golden State's existing taxicab franchise expired by its own terms on March 30, 1981.

It is the City Council, as the governing and legislative body of the City, which grants franchises, such action requiring the enactment of an ordinance. The action is a legislative action. Monarch Cablevision v. City Council, 239 Cal.App.2d 206, 210(2b); 48

Cal.Rptr. 550 (6).

The court ruled in the earlier Golden State Transit case, that the above quoted City Charter language, relating to the granting of a renewal franchise, was permissive thus conferring discretion on the City to deny the franchise. p. 760(4).

On March 23, 1981, the City Council did consider the question as to whether or not to grant Golden State a new franchise. As Golden State states in their Petition they did apply for a new franchise. The City Council had on an earlier date acted on the applications of the other twelve franchise operators. The Council had, as Petitioner states, granted new franchises to eleven of these. At the City Council hearing a representative of the Teamsters, the

union representing the striking Golden State Transit drivers, did urge the non-renewal of the franchise. (CR4, Exhibit 15, p. 3-6).

The transcript of the City Council proceedings also indicates that during the course of the hearing the president of one of the independent driver associations (those drivers who operate pursuant to an independent vehicle permit as opposed to being an employee of a franchise) stated as follows:

> "David Shapiro, President of the United Independent Taxi Drivers. I would like to say that with the demise of the Yellow and 350 less taxis in Los Angeles (referring to Yellow Cab's then non-operations because of its driver's strike) I would like to

inform the Council that the drivers are now being served and are able for the first time in two and one-half years to make a decent minimal living. Secondly, the doormen of the major hotels report to me that they are having better quality service with the demise of the Yellow Cabs than they have ever had before." (CR 4, Exhibit 15, p. 6-7).

Councilman Zev Yaroslavsky questioned Don Howery, the General Manager of the City's Department of Transportation, the department which regulates taxicabs in the City. Part of the questioning was as follows:

"**Mr. Yaroslavsky.** Thank you, Mr. President. Mr. Howery, could you tell me since the strike, how

long has the strike been going on now? About a month?

Mr. Howery. Since February 11.

Mr. Yaroslavsky. And since that time have there been enough taxicabs on the streets to pick up the slack that had been left by their lack of presence?

Mr. Howery. We have not done a study of this, but we . . .

Mr. Yaroslavsky. What is your professional opinion?

Mr. Howery. We have not received complaints.

Mr. Yaroslavsky. Okay."

Mr. Howery went on to testify that before the strike, "There were more than enough taxicabs on the street." (CR 4, Exhibit 15, p. 14-15).

The motion before the City Council was to allow for the granting of a new franchise for Golden State. The motion made no reference in anyway to the strike or a labor dispute. (CR 4, Exhibit 15, p. 34; CR 2, Exhibit 11). During the course of the Council discussion only three Councilpersons made any statement that can be interpreted as a concern on their part of granting the renewal franchise as long as there was a strike. The Council by a vote of 11-1 defeated the motion to allow for the renewal of the franchise. The Council action was strictly the defeat of the motion that would have permitted the renewal. The record does not support the Petition's contention that the City Council made it expressly clear that they refused to renew Golden

State's franchise because of their stance in the labor negotiations.

There is nothing in the record to support the Petition's assertion that the Teamsters and Golden State's competitors engaged in a scheme to withhold renewal of the franchise. The Teamsters did communicate to the City their position which they have a right to do. There is absolutely nothing in the record showing any effort by Golden State's competitors to have the City not renew the franchise other than the statement by the representative of the independent drivers at the City Council public hearing of March 28.

Because three Councilpersons may have made reference to the strike during the Council discussions does not allow for a characterization of the Council action

as part of a conspiracy as asserted by Golden State.

The California Supreme Court, in the case of County of Los Angeles v. Superior Court, 13 Cal.3d 721; 119 Cal.Rptr. 631 (1975), in considering the validity of a County ordinance which was allegedly adopted by the Board of Supervisors as a result of a threatened illegal strike by public employees, stated:

> "On one level, the doctrine which precludes judicial delving into the subjective mental processes of individual legislators is a corollary of the related legal principle which established that the validity of a legislative act does not depend on the subjective motivation of its draftsmen, but

rests instead on the objective effect of the legislative terms. Thus on many occasions this court has declared: ' . . . . (A) judiciary must judge by results, not by the varied factors which may have determined legislative votes.'" p. 727(3).

Golden State also asserts that because of the City's cease and desist order of April 28, 1983, Golden State "ultimately was driven into bankruptcy." Golden State's bankruptcy proceeding is pending in the Bankruptcy Court for the Central District of California, Case No. 81-01812-JD. The record in that case indicates it was commenced February 18, 1981, as an involuntary bankruptcy by an attorney who allegedly had money owing to him by Golden State and then on

August 11, 1981, the Bankruptcy Court, on the application of Golden State, converted the action into a Chapter 11 proceeding.

SUMMARY OF ARGUMENT

Petitioner makes specific reference to the case of Community Communications Co. v. City of Boulder, 455 U.S. 54 (1982) and Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

The Court of Appeals decision rightly concluded that the State of California stance was not one of mere neutrality as to taxicab regulation. The Court concluded that the California Constitution and California statutes show an affirmatively expressed and clearly articulated state policy to displace competition with regulation in the taxicab industry. The State of

Colorado, in the City of Boulder case, had not addressed the question of cable television regulation. The case of Town of Hallie v. City of Eau Claire, wherein this court has granted certiorari, is distinguishable from the present case insofar as in Town of Hallie the City of Eau Claire was not a regulator but a competitor.

The City was not preempted by the National Labor Relations Act from denying Golden State's application for a renewal franchise. Golden State had requested the City to act.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

A. The California State legislative scheme relating to charter party carriers, which includes taxicabs, and the State's implied authorization

for the City to regulate taxicabs is sufficient to meet the "clearly articulated and affirmatively expressed" requirement for local immunity.

Petitioner argues that the California State legislature exhibited the same neutrality towards taxicab regulation by local entities as the State of Colorado did in reference to cable television regulation in the City of Boulder case. This, however, is not accurate.

The State of Colorado, in Boulder, had not addressed, in any way, the regulation of cable television by local entities. Rather the City of Boulder was relying upon a "home rule" provision of the Colorado State Constitution applicable to municipalities. This court, in City of Boulder, 455 U.S. 55, stated that in order for an action of a local entity to be described as

"comprehended within the powers granted . . . necessarily implies an affirmative addressing of the subject by the State."

The State of California, on the contrary, has affirmatively addressed the issue of taxicab regulation. Section 5360 of the California State Public Utilities Code, part of the State Passenger Charter-Party Carriers Act (A-21 of Petition) states;

> "Subject to the exclusions of Section 5353, 'Charter-party carrier of passengers' means 'every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carrier, over any public highway in this State".

By the language of this definition, a

taxicab would be a "Charter-party carrier". (Court of Appeals decision, Golden State Transit, p. 1433-1434, A-7, 8 of Petition.) The State of California has a detailed legislative scheme for the regulation of "charter-party carriers," by the State's Public Utilities Commission contained in the Charter Party Carrier Act. The Court of Appeals decision discusses its various provisions. The State Constitution also authorizes the State Public Utilities Commission to fix rates for such carriers. (Court of Appeals decision, Golden State Transit, p. 1433, A-6 of Petition).

The California State Charter-Party Carrier Act provides that the Act does not apply to taxicab transportation service licensed and regulated by a city

or county, by ordinance. California Public Utilities Code, Sec. 5353(g). (A-20, Petition) As stated the City of Los Angeles does license and regulate taxicabs. But, as the Court of Appeals stated (Golden State Transit, p. 1434, A-8 of Petition), "if a city does not license or regulate taxicabs, the state commission (Public Utilities) has the authority to do so".

The State legislative scheme is authorization for the City to regulate taxicabs in the State of California. The State of California has affirmatively addressed the regulation of taxicabs. In Boulder, this court stated there was "no interaction of state and local regulation" p. 55. Such interaction does exist in this case. The Court of Appeals rightly found that the State statutes

constituted "a clearly articulated and affirmatively expressed policy which allows municipalities to displace competition with regulation in the taxicab industry". (Golden State Transit, p. 1434, A-8 of Petition). Boulder did not require that the State direct a local entity to act for there to be local immunity. It is sufficient if there is State authorization. Boulder, p. 57. The Court of Appeals rightly concluded that the State had authorized the City to license and regulate taxicabs.

The specific City Council action involved here was the Council not approving the renewal franchise for Golden State. This action certainly comes within "regulation". Golden State has attempted to characterize the City's

action as refusing to renew the franchise in order to influence the labor negotiations. But that was not the City Council action. Such a motive cannot properly be ascribed to the City Council so as to make the City Council's action different than it was. Euster v. Eagle Downs Racing Association, 677 Fed.2d 992, 997 ftn. 7 (3d Cir. 1983); United States v. O'Brien, 391 U.S. 367, 383 (1968).

B. The City's regulation of taxicabs satisfies the active supervision test.

As the Court of Appeals, in their opinion, stated:

"The state legislature has determined that public transportation by taxicab should be regulated and that preferably the regulation should be handled by local

government. A requirement of active state supervision would erode local autonomy. It makes little sense to require a state to invest its limited resources in supervisory functions that are best left of municipalities. As Justice Rehnquist observed, "[i]t would seem rather odd to require municipal ordinances to be enforced by the State rather than the City itself. "Community Communications Co. v. City of Boulder, 455 U.S. at 71, n. 6, 102 S.Ct. at 851, n. 6 (Rehnquist, J. dissenting). p. 1434(4).

II. THE CASE OF TOWN OF HALLIE IS DISTINGUISHABLE FROM THE PRESENT ONE.

The California State legislation

enacted a legislative scheme allowing for the displacement of competition with regulation. The City of Los Angeles engages in the licensing and regulation of taxicabs. The City does not participate in the business of operating taxicabs. The City is licensing and regulating. In Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983) the City of Eau Claire was not acting as a regulator. Rather it was looking to state legislation to justify its attempt, as alleged by the four towns affected, of;

> "(U)sing a monopoly over sewage treatment services in the relevant market to gain a monopoly in the markets for sewage collection and sewage treatment _____. P. 377-378.

Town of Hallie is clearly distinguishable on its facts from the present matter.

III. THE CITY'S CONDUCT WAS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

The contention that the City's conduct was preempted by the National Labor Relations Act and thus beyond the contemplation of the State and thus not immune was not raised by Golden State in the summary judgment proceeding in the District Court nor in the appeal from the granting of that partial summary judgment. This question, not being raised or preserved below, was waived.

The City's conduct was to vote against a motion to grant a renewal franchise for Golden State. The City Council did not condition the granting

strike. Golden State asserts that the City "plainly sided with the Teamsters in denying Golden State's franchise renewal." But as Councilman Ernani Bernardi stated during the Council hearing;

> "I don't know how having them (the drivers) stay out of work would be on their side, they are going to be out of a job. But I think this really is a position we've got to take and, would be to remain neutral." (CR 4, Exhibit 15, p. 30)

Mr. Bernardi went on to say that he was going to "vote to remain neutral" (p. 31) and voted against the motion to grant the renewal franchise.

In the present matter, unlike the cases cited by Golden State, Golden

State had asked the City to act. It requested the City to grant it a new franchise replacing the franchise due to expire. The City did not gratuitously interject itself in a labor dispute as the state and local entities did in the cases cited by Golden State. The logic of Golden State's argument would lead to the City having to surrender all discretion when acting on a matter where there was a labor dispute involved. If such was the case all an applicant for a license, permit or franchise from a governmental agency would need to do to assure its issuance is to be involved in a labor dispute at the time the governmental body acted on its application.

Golden State requested a new franchise. The City Council, in the

exercise of its discretion (Golden State Transit v. City, 686 F.2d at p. 760(4)) denied the request.

CONCLUSION

The Court of Appeals' decision is not in conflict with any opinion of this court. There is no serious question raised by the petition. The action involved herein was the City's refusal to grant an applicant a new franchise replacing an expiring one. For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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